

October 24, 2014

Michael C. Robinson  
MRobinson@perkinscoie.com  
D. (503) 727-2264  
F. (503) 346-2264

Ms. Christine Steel, Chair  
West Linn Planning Commission  
City of West Linn Planning Department  
22500 Salamo Road, Suite 1000  
West Linn, OR 97068

**Re: Applications by ConAm Properties, LLC  
City of West Linn File Nos. ZC-14-01/PLN-14-01  
Applicant's Final Written Argument**

Dear Chair Steel and Members of the West Linn Planning Commission:

This office represents ConAm Properties, LLC ("Applicant"), the applicant requesting approval of comprehensive plan and zoning map amendments ("Applications") for approximately 11.41 acres of property located at the northwest corner of Tannler Drive and Blankenship Road ("Property"). This letter constitutes Applicant's final written argument, which is submitted by the Planning Commission's deadline of Friday, October 24, 2014 at 5:00 pm. Applicant requests that the Planning Commission consider this letter in conjunction with the additional argument and evidence presented by Applicant in this matter.

Applicant has submitted substantial evidence that supports the conclusion that the Applications satisfy all applicable approval criteria. As explained below, opponents have not presented argument or evidence that undermines this conclusion or that demonstrates that the City of West Linn ("City") has committed any errors in this matter. Therefore, Applicant requests that the Planning Commission recommend approval of the Applications.

**I. Executive Summary.**

Applicant specifically addresses opponents' contentions as follows:

- The Applications serve the public need of facilitating development of needed multi-family housing.
- There is no basis to include the audio recording of the October 1, 2014 Planning Commission work session in the record for this matter.

- Approval of the Applications will reduce the supply of commercially-zoned lands in the City, but there will continue to be an ample supply available to serve the City's short- and long-term needs.
- The Applications were properly initiated and satisfy all applicable approval criteria.
- The Arch Bridge and Bolton Town Center Existing Conditions Report demonstrates that, like Applicant's consultants, the City's consultants concluded that there is an unmet need for additional multi-family housing in the City.
- Metro Urban Growth Management Functional Plan Title 6 is not applicable.
- Opponents repeat, without elaboration, several contentions that were previously rebutted.
- The Planning Commission did not err in granting Applicant the right to present rebuttal.
- The proposed development will not have an adverse effect on area schools.
- The economic benefits of the project are not exaggerated.
- Conditions for developing multi-family uses in the OBC Zone are ambiguous.
- To the extent it is applicable, Goal 1 of the Savanna Oaks Neighborhood Association Plan is met.
- To the extent it is applicable, the Vision Statement and Action Plan of the Willamette Neighborhood is met.
- Consistency with a 2009 memo to Metro is irrelevant to these proceedings.

## **II. Argument.**

### **A. Response to Oakes Letter dated October 22, 2014.**

#### **1. Public Need.**

Ms. Oakes contends there is no public need for the map changes, as required by Community Development Code (“CDC”) 105.050.C.2. The Planning Commission should deny this contention because there is substantial evidence in the whole record supporting the conclusion that there is a public need. For example, approval of the Applications will facilitate development of additional multi-family housing, which is currently in short supply in the City. *See* Johnson Economics Memo dated June 27, 2014. Second, Applicant’s economist concluded that it was unlikely that the Property would develop with the uses permitted in the OBC zoning district. *See* Johnson Economics Memo dated October 7, 2014. By contrast, development of the Property with multi-family uses is feasible and will generate extensive economic benefits. *Id.* Ms. Oakes does not acknowledge this testimony, let alone rebut it. Therefore, the Planning Commission should deny Ms. Oakes’ contention.

#### **2. Audio Recording of October 1, 2014 Work Session.**

Ms. Oakes requests that the Planning Commission include the audio recording of the October 1, 2014 work session in the record for this matter. The Planning Commission should deny Ms. Oakes’ request for three reasons. First, as has been previously stated, the work session was not a public hearing, the Planning Commission did not accept public testimony, and the Planning Commission took no official action at this meeting. Thus, the events of the work session simply are not relevant to this proceeding.

Second, regardless of whether the recording is relevant, Ms. Oakes’ request is ineffective because it does not satisfy her burden to submit the evidence upon which her argument relies. *See Rhinhart v. Umatilla County*, \_\_ Or LUBA \_\_ (LUBA No. 2006-128, November 28, 2006) (request to incorporate a document in the record does not automatically make it part of the record unless the local government specifically grants the request). If Ms. Oakes intended to include the recording in the record, she could have requested a copy from the City and then included it with her letter. However, she failed to do so. Therefore, the City should deny Ms. Oakes’ request because it effectively asks the City to make Ms. Oakes’ case for her. The City is not doing so for any other party and should not do so for her.



Third, it would be improper for the City to accept the recording into the record at this stage of the proceedings because it is not responsive to previous evidence presented by Applicant. As a result, the recording would constitute new evidence, which would then trigger an opportunity to allow Applicant and other parties to file responses to such new evidence under ORS 197.763(6)(c).

Finally, Ms. Oakes incorrectly states that she was “the only member of the public to attend [the work session].” Ms. Oakes Letter at p. 2. In fact, at least five members of the public (non-Planning Commission, non-staff) attended the work session, including Ms. Oakes, Ed Schwarz (for a portion of the work session), Michael Robinson, Mike Mahoney, and Rob Morgan.

For these reasons, the Planning Commission should deny Ms. Oakes’ request.

**B. Response to Cummings Letter dated October 22, 2014.**

**1. Reduction in Supply of Commercially-Zoned Lands.**

Although Ms. Cummings contends that the Planning Commission should deny the Applications because approving the map changes will reduce the City’s supply of commercially zoned property, the Planning Commission should deny this contention for two reasons. First, Ms. Cummings does not explain how the reduction in commercially zoned property affects compliance with any applicable approval criterion. As a result, the mere loss of commercially zoned property does not establish a basis for the Planning Commission to deny or condition the Applications. *See Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011) (error to deny application based upon factor that was not applicable approval criterion). Second, the City currently has at least a 41-year supply of commercially-zoned property, and potentially even higher. *See Johnson Economics Memorandum* dated June 27, 2014. Therefore, even after approval of the Applications, the City will continue to have an ample short- and long-term supply of commercially-zoned lands. The Planning Commission should deny this contention.

**2. Map Amendments Associated with Specific Development Proposals.**

Although Ms. Cummings contends that zoning should be determined through a long-range planning process and not in response to a specific development proposal, the Planning Commission should deny this contention for two reasons. First, Ms. Cummings’ contention ignores the fact that the CDC allows individual property owners

to initiate applications for map amendments. *See* CDC 99.030.A.1. Second, Ms. Cummings' contention ignores the fact that even map amendments that are tied to specific development proposals must comply with all applicable approval criteria, including demonstrating public need for the change and demonstrating consistency with the City's acknowledged comprehensive plan. This requirement ensures that such map amendments are consistent with the City's planning goals and policies. Thus, it is erroneous to contend that a development-specific map change is based upon "whim." For these reasons, the Planning Commission should deny Ms. Cummings' contention.

**3. Arch Bridge and Bolton Town Center Existing Conditions Report ("Arch Bridge Report").**

Although Ms. Cummings contends that Applicant's reliance upon the Arch Bridge Report in support of the Applications is inappropriate because the City has not yet adopted the Arch Bridge Report, the Planning Commission should deny this contention because it misconstrues Applicant's argument on this point. In fact, Applicant did not contend that the City had adopted the Arch Bridge Report. Rather, Applicant presented this testimony to demonstrate that the City's own consultant independently reached the same conclusion as Applicant's consultants that there is there is an unmet need for additional multi-family housing in the City. Ms. Cummings does not challenge the conclusions of the Arch Bridge Report. Therefore, the Planning Commission should deny Ms. Cummings' contentions on this issue.

**4. Consistency with Metro Urban Growth Management Functional Plan Title 6 ("Title 6").**

Although Ms. Cummings contends that the Planning Commission should deny the Applications because the City has not yet taken action to comply with Title 6 pertaining to investments in Centers, Corridors, Station Communities, and Main Streets, the Planning Commission should deny this contention for two reasons. First, there is no basis to conclude that compliance with Title 6 is a prerequisite to consideration or approval of the Applications. Second, the only substantive provision from Title 6 identified by Ms. Cummings—Metro Code 3.07.620.D.3—only applies to designated Centers, Corridors, Station Communities, and Main Streets, and the Property is not located within any of these designated areas. As a result, this provision is not applicable. Therefore, there is no basis to sustain Ms. Cummings' contention on this issue.



**5. “Eyes on the Big Picture.”**

Ms. Cummings’ fifth contention appears to simply be a restatement of her second contention. The Planning Commission should deny this contention for the reasons stated in response to Section 2 above.

**C. Response to Schwarz Letter dated October 22, 2014.**

**1. Opponents Repeat, Without Any Elaboration, Several Contentions that Applicant Previously Rebutted.**

Mr. and Mrs. Schwarz’s letter is replete with contentions that are verbatim duplications of contentions they have previously raised and that Applicant has previously rebutted. Repeating an argument that has been refuted does not make it any more persuasive than it was the first time. Mr. and Mrs. Schwarz do not offer any additional explanation in support of their contentions nor do they explain why Applicant’s rebuttal was lacking or why the evidence and legal precedent identified by Applicant was inadequate. Under these circumstances, there is no basis for the Planning Commission to sustain Mr. and Mrs. Schwarz’s contentions.

For the sake of the Planning Commission’s time, Applicant will not exhaustively rehash all of the arguments and rebuttals in this letter. Instead, Applicant has prepared a helpful chart, which identifies: (1) the contentions that Mr. and Mrs. Schwarz copied from earlier testimony into their October 22, 2014 letter; and (2) the location(s) in the record where Applicant originally rebutted these contentions:

<b>SCHWARZ CONTENTION</b>	<b>APPLICANT REBUTTAL</b>
Item 2 - Inability to Access Work Session	Oct. 8, 2014 AM ltr from M. Robinson <sup>1</sup> , pp. 3-4.
Item 3 – Compliance with CDC 105.050.B	Oct. 8, 2014 PM ltr from M. Robinson, pp. 4-5.

<sup>1</sup> Michael Robinson submitted two letters to the City dated October 8, 2014. The first submittal occurred in the morning, so this letter is referred to as the “Oct. 8, 2014 AM ltr.” Applicant understands that this letter is set forth at pp. 1-17 of the October 15, 2014 Planning Commission packet. The second submittal occurred in the afternoon, so this letter is referred to as the “Oct. 8, 2014 PM ltr.” Applicant understands that this letter is set forth at pp. 292-320 of the October 15, 2014 Planning Commission packet.

and 99.110.B	
Item 9 - Plan Goal 2, Section 1, paragraph 7.c.ii and iii	Oct. 8, 2014 PM ltr from M. Robinson, p. 5.
Item 10 - Plan Goal 9, Policy 11	Oct. 8, 2014 PM ltr from M. Robinson, pp. 8-9.
Item 11 - Neighborhood Association Resolutions	Oct. 8, 2014 PM ltr from M. Robinson, p. 7.
Item 12 - Plan Goal 12, Policy 4	Oct. 8, 2014 PM ltr from M. Robinson, p. 3.
Item 13 - Community Preferences for Single-Family Housing	Oct. 8, 2014 PM ltr from M. Robinson, pp. 7-8.
Item 14 - City Economic Development Objectives	Oct. 8, 2014 PM ltr from M. Robinson, pp. 8-9.
Item 15 - Tualatin Valley Fire & Rescue	Oct. 8, 2014 PM ltr from M. Robinson, p. 6.
Item 18 - Property Values	Oct. 8, 2014 PM ltr from M. Robinson, p. 9.

## **2. The Planning Commission Did Not Err in Granting Applicant the Right to Present Rebuttal.**

Although Mr. and Mrs. Schwarz contend that the Planning Commission committed a procedural error in granting Applicant the right to present both oral and written rebuttal, the Planning Commission should deny this contention for four reasons.

First, contrary to the Schwarzes' contention, the Planning Commission's procedures do not limit the Planning Commission to providing only one rebuttal opportunity for Applicant. Rather, those procedures note that the Planning Commission must consider quasi-judicial applications in accordance with the "requirements of ORS 197.763 and the West Linn Community Development Code." ORS 197.763(6)(e) expressly provides that Applicant has the right to submit final written argument "after the record is closed to all other parties." Thus, state law grants Applicant "the last word," which is consistent with the fact that Applicant bears the burden of proof in this matter. Additionally, the CDC



grants the Planning Commission wide latitude to conduct its proceedings and to establish reasonable rebuttal periods. *See* CDC 99.170.A.2 (allowing the Planning Commission to regulate the course and scope of the hearing and related continuances), CDC 99.170.A.5 (allowing the Planning Commission to establish reasonable limits on rebuttal testimony), 99.170.F (authorizing applicant to submit final written argument, without new evidence, after the close of the record to all other parties). Considering all of these provisions together, the Planning Commission has the clear authority to allow both an oral and written rebuttal to Applicant.

Second, Mr. and Mrs. Schwarz waived this contention by failing to object to it at the time the Planning Commission was deciding the applicable procedures. A party must object to the alleged error at the time it occurred in order to preserve it for appeal. *Woodstock Neighborhood Association v. City of Portland*, 28 Or LUBA 146, 150-151 (1994). The purpose of this requirement is to make the local government aware of the objection and allow the local government a timely opportunity to address the alleged error before it occurs. In this case, the Planning Commission announced its revised evidentiary and rebuttal procedures at the October 15, 2014 meeting, the continued hearing date for this matter. Mr. and Mrs. Schwarz did not attend that continued hearing and thus did not object to the evidentiary and rebuttal procedures announced at the meeting. Therefore, Mr. and Mrs. Schwarz have waived their right to object to these procedures.

Third, even if the Planning Commission erred, the error is immaterial. LUBA may reverse or remand a local government land use decision due to a procedural error but only when the error prejudices the petitioner's substantial rights. ORS 197.835(9)(a)(B). A party's substantial rights include an adequate opportunity to prepare a case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771 (1988). A party bears the burden of explaining how its substantial rights are prejudiced, including stating with specificity what would have been different had the correct procedures been followed. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 83 (1997). Mr. and Mrs. Schwarz do not contend that the error prejudiced their substantial rights. Therefore, the Planning Commission should deny Mr. and Mrs. Schwarz's contention.

Fourth, to the extent Mr. and Mrs. Schwarz contend that the error also affected third parties, it fails because a party cannot raise a procedural objection on behalf of third parties. *See Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000) (so holding).

The Planning Commission should find that it did not commit a procedural error.



**3. The Proposed Development Will Not Have an Adverse Effect on Area Schools.**

Although Mr. and Mrs. Schwarz contend that the proposed development will adversely affect area schools by generating 98 new students, this contention lacks merit for six reasons. First, the West Linn-Wilsonville School District ("School District") did not testify that the proposed development would generate 98 new students or that it would adversely impact schools.

Second, as noted on the record, Applicant could develop the same number of multi-family units on the Property under the existing OBC zoning district. Thus, any potential student impacts from the Property can occur independent of the City's decision on the Applications.

Third, Mr. and Mrs. Schwarz have overestimated the number of students that an approximately 208-unit apartment complex would yield by applying the forecast factor applicable to all units in West Linn rather than the forecast factor specific to multi-family units. *See* Johnson Economics Memorandum dated October 7, 2014. The forecast factor utilized by Mr. and Mrs. Schwarz is not reliable because it reflects the existing housing stock in the City, which is overwhelmingly single-family in nature, and single-family homes generate more students per unit than multi-family dwellings do. As Applicant has testified, if the correct multi-family forecast factor is applied, it indicates that Applicant's proposed development would yield 44 students.

Fourth, as previously explained on the record, even if there were a lack of school capacity, the City may not deny the Applications on this basis under the prevailing facts. ORS 195.110(13). *See* M. Robinson October 8, 2014 PM Letter at p.6.

Fifth, even if the development generated 98 new students, this number of students would equate to an approximately 2% increase in the student population in the West Linn portion of the School District and an approximately 1% increase in the student population in the entire School District. As such, at the broader level, this increase is negligible.

Sixth, Applicant will pay substantial taxes to the School District estimated as follows:

- \$230,500 in school excise taxes (at construction)
- \$150,026 ad valorem taxes to School District (annually)
- \$46,225 to School District levy (annually)
- \$24,086 to School District Bond 1 (annually)

- \$66,939 to School District Bond 2 (annually)

See Johnson Economic Memorandum dated June 27, 2014 at pp. 25-26. For these reasons, the Planning Commission should deny this contention.

**4. The Economic Benefits of the Project are Not Exaggerated.**

Although Mr. and Mrs. Schwarz contend that Applicant has overstated the economic benefits of the proposed development to the City by about \$100,000, the Planning Commission should deny this contention. Applicant acknowledges that its statement could have been construed to mean that the total estimated ad valorem taxes to be paid by the development on an annual basis (\$572,614) would flow directly to the City when, in fact, some of those taxes will flow to other tax-collecting agencies. However, Applicant notes that it correctly stated the total estimated ad valorem tax revenues generated by the project, and Mr. and Mrs. Schwarz do not contend otherwise. Further, the fact that ad valorem tax revenues may flow to another agency, such as Clackamas County or the School District, does not mean that these funds will not benefit City residents. Finally, opponents' contentions concerning the projected job creation associated with the project amounts to little more than quibbling with details. For these reasons, the Planning Commission should deny the Schwarzes' contention.

**5. OBC Conditions for Multi-Family Development Are Ambiguous.**

Although Mr. and Mrs. Schwarz contend that Applicant erroneously states that the OBC zoning district only permits multi-family residential development under uncertain circumstances, the Planning Commission should deny the Schwarzes' contention. To clarify, Applicant's point was that the CDC does not clearly define how much retail is required in conjunction with a multi-family development or where that retail development must be located. As a result, there is considerable subjectivity associated with the City's review of any application for multi-family development in the OBC zoning district. For a land use applicant, subjectivity is tantamount to uncertainty, ambiguity, and risk. In this case, Applicant has concluded that developing multi-family residential uses in the OBC zoning district creates an unreasonably high level of risk. Therefore, the Planning Commission should deny this contention.



**6. To the Extent it is Applicable to the Applications, Goal 1 of the Savanna Oaks Neighborhood Association Plan is Met.**

Although Mr. and Mrs. Schwarz contend that approval of the Applications is inconsistent with Goal 1 of the SONA Plan<sup>2</sup>, the Planning Commission should deny this contention because the goal is not applicable for two reasons. First, there is no evidence that the City intended for this goal to directly apply to site-specific quasi-judicial land use applications such as the Applications. The plain language does not so provide. Second, the goal is also not applicable because the Applications do not propose any additional traffic. In fact, as noted, the development will generate less traffic. Additionally, the City will review a site-specific design, which will consider traffic, circulation, and access impacts associated with developing the Property, through a later public process. Therefore, the Planning Commission can find that this goal is not applicable to the Applications.

**7. To the Extent it is Applicable to the Applications, the Vision Statement and Action Plan of the Willamette Neighborhood is Met.**

Although Mr. and Mrs. Schwarz contend that approval of the Applications is inconsistent with the Vision Statement<sup>3</sup> and Action Plan of the Willamette Neighborhood, the Planning Commission should deny this contention for two reasons. First, there is no evidence that a general vision statement directly applies to site-specific quasi-judicial land use applications such as the Applications. Second, and in the alternative, the provision is applicable and satisfied because approval of the Applications will facilitate development of the Property, which will increase the value of the Property relative to its current vacant state. Any adverse impacts on offsite properties is entirely speculative for the reasons explained on the record. The Planning Commission should deny this contention.

---

<sup>2</sup> SONA Plan Goal 1 is “to improve traffic flow on 10th Street corridor.”

<sup>3</sup> The Action Plan of the Willamette Neighborhood Vision Statement states that the neighborhood association is committed to “[w]ell-thought out neighborhood planning which sustains the value of the land.”

**8. Consistency with a 2009 Memo to Metro is Irrelevant to these Proceedings.**

Although Mr. and Mrs. Schwarz contend that the Applications are inconsistent with "Local Community Growth Aspirations" set forth in a memo from the then-City Planning Director to Metro staff, the Planning Commission should find that this memorandum is irrelevant because it is not an applicable approval criterion and does not inform whether the Applications satisfy any applicable approval criteria. *See Buel-McIntire*, 63 Or LUBA at 452 (2011) (error to deny application based upon factor that was not applicable approval criterion).

The Planning Commission should deny Mr. and Mrs. Schwarz's contention on this issue.

**III. Conclusion.**

Based upon the evidence and argument in the record, Applicant respectfully requests that the Planning Commission deny the opponents' contentions and recommend approval of the Applications.

Very truly yours,

A handwritten signature in blue ink, appearing to read "MCR" followed by "for".

Michael C. Robinson

MCR:rsr

cc: Mr. Rob Morgan (via email)  
Mr. Mike Mahoney (via email)  
Mr. Chris Kerr (via email)  
Mr. Brent Ahrend (via email)  
Mr. Brendan Buckley (via email)  
Mr. Zach Pelz (via email)  
Ms. Megan Thornton (via email)  
Mr. Dan Olsen (via email)